Nos. 14-1499, 14-1664

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T CORP. and TELEPORT COMMUNICATIONS OF AMERICA, LLC,
Plaintiffs-Appellees,

v.

CORE COMMUNICATIONS, INC.; ROBERT F. POWELSON, Chairman of the Pennsylvania Public Utility Commission in his official capacity; JOHN F. COLEMAN, Vice Chairman of the Pennsylvania Public Utility Commission in his official capacity; WAYNE E. GARDNER, JAMES H. CAWLEY, AND PAMELA A. WITMER, Commissioners of the Pennsylvania Public Utility Commission in their official capacity,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, Case No. 2:12-cv-07157
The Honorable District Judge Mary A. McLaughlin

BRIEF OF APPELLEES AT&T CORP. AND TELEPORT COMMUNICATIONS OF AMERICA, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, Plaintiffs-Appellees AT&T Corp. and Teleport Communications of America, LLC make the following disclosures:

1) *For non-governmental corporate parties please list all parent corporations.* AT&T Corp. is a wholly owned subsidiary of AT&T Inc. Teleport Communications of America, LLC is a subsidiary of Teleport Communications Group, Inc., which is a wholly owned subsidiary of AT&T Corp., which is a wholly owned subsidiary of AT&T Inc.

2) *For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.* AT&T Inc.

3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.* AT&T Inc. is the only publicly held corporation, which is not a party, that has a financial interest in the case by virtue of its ownership of AT&T Corp. and its indirect ownership of Teleport Communications of America, LLC.

4) *This is not a bankruptcy appeal.*

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JURISDICTIONAL STATEMENT

The jurisdictional statements in the briefs of Appellant Core Communications, Inc. ("Core") and Appellants Robert F. Powelson, John F. Coleman, Wayne E. Gardner, James H. Cawley, and Pamela A. Witmer in their official capacities as Commissioners of the Pennsylvania Public Utility Commission (collectively, the "PUC" or "PPUC") are not correct and complete.

The district court had jurisdiction in this case pursuant to 47 U.S.C. §§ 206 and 207 and 28 U.S.C. §§ 1331, 1332, and 1337. Appellees AT&T Corp. and Teleport Communications of America, LLC ("TCA," and collectively with AT&T Corp., "AT&T") brought suit in the district court alleging that the PUC—through an Order issued on December 5, 2012 ("Dec. 5, 2012 Order," JA 219-302)[1] and a second Order issued on August 15, 2013 ("Aug. 15, 2013 Order," JA 303-366, collectively the "PUC Orders")—exceeded its jurisdiction and violated Sections 201, 203, 251(b)(5) and 415(a) of the Communications Act of 1934, as amended. First Am. Compl. (D21 at 1-15). The PUC Orders purported to require AT&T to pay Core for terminating locally dialed calls from AT&T customers to Core's Internet Service Provider customers ("ISPs") dating back to 2005.

[1] "JA __" refers by page number to items in the joint appendix submitted with the PUC's brief. "D__ at __" refers by district court docket number and ECF-assigned page number to items in the record on appeal. "Core Br. at __" refers by page number to the brief filed in this Court by Core, and "PUC Br. at __" refers by page number to the brief filed in this Court by the PUC.

This Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. On January 30, 2014, the district court issued a Memorandum holding that the PUC exceeded its jurisdiction (JA1-33) and entered an Order permanently enjoining the enforcement of the PUC Orders (JA34-35, D48). Pursuant to Fed. R. App. P. 4(a)(1)(A), on February 28, 2014, the PUC filed a timely Notice of Appeal from the Memorandum and Order. JA42-43, D53.

On March 11, 2014, the district court entered an Order granting Judgment for AT&T and directing the Clerk of Court to close the case. JA40-41, D57. Pursuant to Fed. R. App. P. 4(a)(1)(A), on March 19, 2014, Core filed its own timely Notice of Appeal from that Judgment. JA44-46, D58.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court was correct in holding that the PUC lacked jurisdiction to set a rate and require AT&T to pay Core for Core's termination of locally dialed ISP-bound traffic, on a retroactive basis dating back nearly five years, where:

- the traffic at issue is jurisdictionally interstate and thus within the exclusive jurisdiction of the Federal Communications Commission (the "FCC");
- there is no federal law or regulation that delegates authority or jurisdiction to state commissions to set and regulate rates for the exchange of interstate traffic between two competitive local exchange carriers ("CLECs"), like AT&T and Core here;
- there has never been a contract between AT&T and Core providing for compensation for terminating locally dialed ISP-bound traffic; and

- Core never filed a federal tariff with the FCC setting out terms and rates under which Core could receive compensation for terminating this traffic.

AT&T raised this issue in its Complaint (D1 at 15), its First Amended Complaint (D21 at 12), its Motion for Preliminary Injunction (D20 at 2), its Supporting Brief (D20-2 at 20-23), and its Reply Brief (D30 at 7-11). The district court ruled on this issue in its January 31, 2014 Memorandum, holding that "[t]he defendants have not pointed to any authority for the PPUC's exercise of jurisdiction" and that "[t]he PPUC, therefore, did not have jurisdiction and its Orders of December 5, 2012 and August 15, 2013 are invalid." JA22-33. The district court permanently enjoined the enforcement of the PUC Orders (JA34-35, D48 at 1-2) and entered judgment for AT&T (JA40-41, D57 at 1-2).

2. Whether the district court's holding should be affirmed on the alternative ground that the PUC Orders violate 47 U.S.C. §§ 201 and 203 by requiring AT&T to pay Core for terminating interstate traffic in the absence of a governing federal tariff or contract where Section 203 requires carriers to have a tariff or contract in order to recover charges and Section 201 prohibits untariffed charges as unjust.

AT&T raised the PUC's violation of 47 U.S.C. §§ 201 and 203 in its Complaint (D1 at 15-16), its First Amended Complaint (D21 at 12-13), its Motion for Preliminary Injunction (D20 at 2), its Supporting Brief (D20-2 at 23-26), and its Reply Brief (D30 at 11-13). Because the district court held the PUC Orders

invalid for lack of jurisdiction, the court did not reach this alternative argument. JA22-23.

3. Whether the district court's holding should be affirmed on the alternative ground that the PUC Orders violate 47 U.S.C. § 251(b)(5) by allowing Core to collect reciprocal compensation from AT&T without establishing an arrangement with AT&T—in the form of a contract or tariff—where Section 251(b)(5) requires an arrangement before a carrier can recover reciprocal compensation.

AT&T raised the PUC's violation of 47 U.S.C. § 251(b)(5) in its Complaint (D1 at 16-17), its First Amended Complaint (D21 at 14), its Motion for Preliminary Injunction (D20 at 2), its Supporting Brief (D20-2 at 26-28), and its Reply Brief (D30 at 13-14). Because the district court held the PUC Orders invalid for lack of jurisdiction, the court did not reach this alternative argument. JA22-23.

4. Whether the district court's holding should be affirmed on the alternative ground that the PUC Orders violate the prohibition against retroactive ratemaking by purporting to set a rate for terminating locally dialed ISP-bound traffic in Orders issued in 2012 and 2013 and allowing Core to recover under that rate for traffic dating back to 2005.

AT&T raised the PUC's violation of the prohibition against retroactive ratemaking in its Complaint (D1 at 16), its First Amended Complaint (D21 at 13),

its Motion for Preliminary Injunction (D20 at 2), its Supporting Brief (D20-2 at 28-29), and its Reply Brief (D30 at 14-15). Because the district court held the PUC Orders invalid for lack of jurisdiction, the court did not reach this alternative argument. JA22-23.

5. Whether the district court's holding should be affirmed on the alternative ground that the PUC Orders violate the two-year statute of limitations in 47 U.S.C. § 451(a) by allowing Core to recover under a state law four-year limitations period where Section 451(a) governs actions by telecommunications carriers to recover charges.

AT&T raised the PUC's violation of the federal statute of limitations in its Complaint (D1 at 17), its First Amended Complaint (D21 at 14-15), its Motion for Preliminary Injunction (D20 at 2), its Supporting Brief (D20-2 at 29-30), and its Reply Brief (D30 at 15-16). Because the district court held the PUC Orders invalid for lack of jurisdiction, the court did not reach this alternative argument. JA22-23. If the Court affirms the district court's holding on this ground, it would invalidate the PUC Orders to the extent those Orders required payment beyond the federal two-year statute of limitations. This is significant because almost all of the charges at issue fall outside the two-year limitations period.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. The PUC's Statement of Related Cases is not complete and correct.

In 2011, the Ninth Circuit decided a case involving the exchange of ISP-bound traffic between two CLECs. *AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011) ("*Pac-West*"). In that case, the state utility commission, the California Public Utilities Commission ("CPUC"), ordered that the ISP-bound traffic at issue be subject to a rate contained in a state long-distance tariff. *Id.* at 989-90. That rate exceeded the rate cap set by the FCC in its 2001 *ISP Remand Order*, which limits the rate a state commission can impose through arbitration or enforcement of an interconnection agreement ("ICA") under 47 U.S.C. § 252. *Implementation of the Local Competition Provisions*, 16 FCC Rcd 9151, 9187 ¶ 78 (2001) ("*ISP Remand Order*"). The Ninth Circuit held that the CPUC's order was invalid because it imposed a rate exceeding the cap in the *ISP Remand Order*, and was thus preempted. *Pac-West*, 651 F.3d at 998. The Ninth Circuit declined to address the alternative argument that the CPUC lacked jurisdiction to set a rate for ISP-bound traffic outside the context of a proceeding under 47 U.S.C. § 252. *Id.* at 993-99.

Here, in contrast, the PUC purported to set a rate equal to the rate cap in the *ISP Remand Order*. JA6. The district court below held that the PUC lacked

jurisdiction, outside of a Section 252 proceeding, to set a rate for terminating locally dialed ISP-bound traffic, which is jurisdictionally interstate. JA22-33.

The PUC also notes that it filed a Petition for a Declaratory Order with the FCC on April 29, 2014. PUC Br. at 5-6. The Petition asks the FCC to declare that state commissions have ratemaking and regulatory authority over ISP-bound traffic outside the context of a Section 252 proceeding, as long as the commission does not set a rate above the cap in the *ISP Remand Order*. *See* PUC Br. at 5-6.

On May 16, 2014, the FCC's Wireline Competition Bureau issued a Public Notice asking for comments on the PUC Petition by June 30, 2014 and reply comments by July 30, 2014. On June 30, AT&T's affiliate, AT&T Services, Inc., filed comments asking the FCC to deny the Petition because the PUC improperly sought to collaterally challenge the district court's holding and its requested relief is barred by *res judicata*. AT&T Comments, at 16-21.[2] In the alternative, AT&T Services asked the FCC to reaffirm its prior orders holding that ISP-bound traffic is jurisdictionally interstate and thus outside of the PUC's ratemaking and regulatory jurisdiction. *Id.* at 22-32. The CPUC also filed comments supporting the PUC's request for declaratory relief. No other party filed opening comments.

[2] The opening and reply comments to the PUC Petition are available at the FCC's website at http://apps.fcc.gov/ecfs/proceeding/view?z=p1i3e&name=14-70.

On July 30, Core and the PUC filed reply comments in support of the PUC Petition, which largely mirror each party's briefs before this Court. Verizon also filed reply comments asking the FCC to deny the PUC Petition "because state commissions lack jurisdiction over jurisdictionally interstate traffic and because the petition is an impermissible collateral attack on a district court decision in a case to which the Pennsylvania PUC was a party." Verizon Reply Comments, at 1.

Both the district court and this Court denied motions by the PUC to stay this appeal pending the FCC's review of the PUC Petition. March 11, 2014 District Court Order (JA38-39, D56); *see also* May 22, 2014 Third Circuit Order.

STATEMENT OF THE CASE

I. Statutory And Regulatory Background

A. The Communications Act of 1934

The Communications Act of 1934 (the "Communications Act") established "a system of dual state and federal regulation over telephone service." *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 360 (1986). The Act created the FCC and gave it exclusive jurisdiction to "regulat[e] interstate and foreign … communication by wire and radio" (47 U.S.C. §§ 151, 152(a)), while preserving state authority to regulate "intrastate communication service" (47 U.S.C. § 152(b)).

B. Federal Tariffing Requirements

The Communications Act requires "every common carrier engaged in interstate or foreign communication" to file a federal tariff or schedule with the

FCC "showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication." 47 U.S.C. § 203. A carrier seeking to enforce its federal tariff may choose to bring suit either in federal court or before the FCC. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1173 (9th Cir. 2002) (citing 47 U.S.C. § 207).

The FCC has granted CLECs "permissive detariffing," which allows a CLEC to impose and collect charges for interstate services either through a tariff or a contract negotiated with a competing carrier. *See In re Hyperion Telecom., Inc. Petition Requesting Forbearance*, 12 FCC Rcd 8596, 8596 ¶ 1(1997). In contrast, incumbent local exchange carriers ("ILECs") are still subject to mandatory tariffing under Section 203.

Thus, under the federal tariffing scheme, a CLEC is permitted to assess charges on jurisdictionally interstate traffic in one of two ways: either by filing a federal tariff with the FCC or by negotiating a contract with the other carrier. The FCC has repeatedly reaffirmed that, in the absence of a filed tariff or a contract, a carrier "lacks authority" to charge for interstate services. *AT&T Corp. v. All American Tel. Co.*, 28 FCC Rcd 3477, 3494 ¶ 37 (2013) ("*All Am.*") ("[U]ntil a CLEC files valid interstate tariffs under Section 203 of the [Communications] Act or enters into contracts" for interstate services, "it lacks authority to bill for those services.").

C. The Telecommunications Act of 1996

"Prior to 1996, local telephone service operated as a monopoly, subject to exclusive regulation by the several states." *MCI Tele. Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 498 (3d Cir. 2001) ("*MCI Tele. Corp.*"). "In each local service area, the states would grant a monopoly franchise to one local exchange carrier, which owned the facilities and equipment necessary to provide telephone service." *Id.*

Congress passed the federal Telecommunications Act of 1996 (the "1996 Act") in order to encourage competition in local telephone markets. *Id.* Among other things, the Act essentially required the former monopoly companies, the ILECs, to "share their networks and services with competitors [CLECs] seeking entry into the local service market." *Id.* The 1996 Act "preempted exclusive state regulation of local monopolies in favor of the competitive scheme established in 47 U.S.C. §§ 251 and 252." *Id.*; *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) ("*I.U.B.*") (through the 1996 Act, "Congress … ended the longstanding regime of state-sanctioned monopolies").

D. Section 251(c)

Section 251(c) of the 1996 Act imposes certain duties solely on ILECs. 47 U.S.C. § 251(c). Among other things, 47 U.S.C. § 251(c), requires an ILEC to provide CLECs with access to the ILEC's network. *MCI Tele. Corp.*, 271 F.3d at

498. Upon request from a CLEC, Section 251(c)(1) imposes a duty on the ILEC to "negotiate in good faith" the "terms and conditions of agreements" to permit the CLEC to share the ILEC's network. *Id.* (citing 47 U.S.C. § 251(c)(1)). These agreements are known as interconnection agreements, or "ICAs." *Id.*

The duties of Section 251(c), including the duty to negotiate an ICA with a requesting carrier, apply only to ILECs. A CLEC is not required to negotiate or enter into an ICA with another CLEC. *MCI Tele. Corp.*, 271 F.3d at 498-99.

E. Section 252

Section 252 of the 1996 Act provides a means to implement the duties imposed on ILECs in Section 251. 47 U.S.C. § 252. Under Section 252, an ILEC and a requesting carrier (a CLEC) may "negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). If negotiations prove unsuccessful, either party may petition the relevant state utility commission to arbitrate any unresolved issues. *MCI Tele. Corp.*, 271 F.3d at 500 (citing 47 U.S.C. § 252(b)(1)). The 1996 Act and the FCC regulations detail the procedures and standards that the state must follow in conducting the arbitration. *Id.* (citing 47 U.S.C. § 252(b), (c), (d)).

The authority granted to state commissions to arbitrate ICAs under Sections 251 and 252 is federal authority that has been delegated by Congress, not preexisting state authority. *See id.* at 510 (under the 1996 Act, "states are not merely acting in an area regulated by Congress; they are now voluntarily

regulating on behalf of Congress"); *see also MCI Tele. Corp. v. Illinois Bell Tele. Co.*, 222 F.3d 323, 344 (7th Cir. 2000) ("*Ill. Bell*") (when acting under Sections 251 and 252, a state commission is a "'deputized' federal regulator").

F. Section 251(b)

Section 251(b) of the 1996 Act imposes certain duties on all local exchange carriers ("LECs"), including both ILECs and CLECs. 47 U.S.C. § 251(b). Among other things, Section 251(b) requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). "Reciprocal compensation" refers to payments between telephone companies in a local exchange that work together to complete calls. *See ISP Remand Order*, 16 FCC Rcd at 9162 ¶ 20. Under the traditional reciprocal compensation scheme, the carrier whose customer received a call (the "terminating" carrier) would bill the carrier whose customer placed the call (the "originating" carrier). *See Pac-West*, 651 F.3d at 981.

A CLEC can establish a reciprocal compensation arrangement with an ILEC by requesting that the ILEC negotiate an ICA governing reciprocal compensation between the parties. 47 U.S.C. § 251(c). If the parties are unable to reach agreement voluntarily, either party may ask the state commission to arbitrate the terms of the ICA pursuant to Section 252. 47 U.S.C. § 252(b). Section 252 provides standards that must be met before the state commission may find "the

terms and conditions for reciprocal compensation to be just and reasonable." 47 U.S.C. § 252(d)(2)(A).

In contrast, a CLEC cannot be required to negotiate or arbitrate an ICA with another CLEC. 47 U.S.C. § 251(c); *see also MCI Tele. Corp.*, 271 F.3d at 498-99. Nonetheless, a CLEC still has options that enable it to establish an arrangement with, and recover reciprocal compensation from, another CLEC. First, two CLECs may voluntarily enter into a contract governing reciprocal compensation, such as a Traffic Exchange Agreement ("TEA"). Second, the FCC has clarified that a CLEC can file a tariff governing terms and rates for reciprocal compensation. *See Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4855, 4860-61 ¶¶ 9-10 (2005). In the absence of an "arrangement," *i.e.*, a contract or tariff, however, a CLEC may not recover reciprocal compensation from another CLEC. *See All Am.*, 28 FCC Rcd at 3494 ¶ 37 ("[U]ntil a CLEC files valid interstate tariffs ... or enters into contracts" for interstate services, "it lacks authority to bill for those services.").

G. ISP-bound traffic and the *ISP Remand Order*

After the passage of the 1996 Act, the FCC received requests to clarify whether ISP-bound traffic is subject to the reciprocal compensation obligations in Section 251(b)(5). The FCC addressed the issue in its landmark 2001 *ISP Remand Order*. The FCC first affirmed that ISP-bound traffic is "properly classified as interstate," because the calls are analyzed as a continuous transmission from the

ISP's customer to the websites visited by the customer, which often are located in another state. 16 FCC Rcd at 9175 ¶ 52. And because ISP-bound traffic is jurisdictionally interstate, the FCC held that it has authority under 47 U.S.C. § 201(b) to establish intercarrier pricing rules for the traffic. *Id.*

The FCC next explained that the application of reciprocal compensation to ISP-bound traffic gives rise to substantial market distortions "creating an opportunity for regulatory arbitrage and leading to uneconomical results." *Id.* at 9162 ¶ 21. Specifically, ISP-bound communications create large numbers of calls that flow almost exclusively in one direction – from the ISP's customer to the ISP. *Id.* at 9162 ¶¶ 20-21. Thus, reciprocal compensation for ISP-bound traffic also is overwhelmingly in one direction – from the originating LEC to the LEC serving the ISP. *Id.* The FCC determined that the opportunity to be on the receiving end of these payments encourages the "inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local competition, as Congress had intended to facilitate with the 1996 Act." *Id.* at 9162 ¶ 21.

Weighing these considerations, the FCC concluded that ISP-bound traffic "is not subject to the reciprocal compensation obligations of section 251(b)(5)." *Id.* at 9154 ¶ 3. Rather, the FCC found that the best method for cost allocation of ISP-bound traffic is probably a "bill-and-keep" system, "whereby each carrier recovers costs from its own end-users" instead of collecting from other carriers. *Id.* at 9154

¶ 4. Because the FCC found that it needed additional information before implementing a bill-and-keep system, it established an "interim" compensation scheme. *Id.* at 9155 ¶ 7. A key component of that scheme was the introduction of a declining "rate cap," which limits the rates that state commissions can impose upon carriers in arbitrating or interpreting arrangements covering the delivery of ISP-bound traffic. *Id.* at 9156 ¶ 7. The rate cap was set in increments that declined to $0.0007/Minutes of Use ("MOU") within 25 months. *Id.* at 9187 ¶ 78.

Although the FCC eliminated state commission authority to impose higher rates on carriers, it emphasized that the rate cap had "no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps … or on a bill-and-keep basis (or otherwise have not required payment of compensation for this traffic)." *Id.* at 9188 ¶ 80. Although the FCC did not "alter existing contractual obligations … [or] preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to" the *ISP Remand Order*, the Commission declared that, "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic ... state commissions will no longer have authority to address this issue." *Id.* at 9189 ¶ 82.

H. The ISP Mandamus Order

In 2002, the D.C. Circuit reviewed the *ISP Remand Order* and rejected the FCC's reasoning for determining that ISP-bound traffic did not fall within the reciprocal compensation scheme in Section 251(b)(5). *Worldcom, Inc. v. F.C.C.*, 288 F.3d 429, 430 (D.C. Cir. 2002). However, the court determined that there were probably "other legal bases for adopting the rules chosen by" the FCC, so the court remanded the matter to the FCC without vacating the rules. *Id.*

In 2008, the FCC addressed the D.C. Circuit's remand and determined that ISP-bound traffic does fall within the scope of § 251(b)(5). *Implementation of the Local Competition Provisions*, 24 FCC Rcd 6475, 6483 ¶ 16 (2008) ("*ISP Mandamus Order*"), *aff'd*, *Core Commc'ns, Inc. v. F.C.C.*, 592 F.3d 139, 144-45 (D.C. Cir.) ("*Core Commc'ns, Inc.*"), *cert. denied*, 131 S.Ct. 597 (2010). The FCC also reaffirmed that ISP-bound traffic is "clearly interstate in nature" and that the FCC "unquestionably has authority to regulate intercarrier compensation with respect to ... ISP-bound traffic." *Id.* at 6483 ¶ 17.

II. Factual Background

A. The parties and the traffic at issue

At all relevant times, both AT&T and Core have been certificated by the PUC to operate as CLECs in Pennsylvania.[3] *ALJ Initial Decision*, Findings of Fact

[3] Neither AT&T Corp. nor TCA were parties to the proceedings before the PUC. Rather, AT&T Corp.'s subsidiary, AT&T Communications of Pennsylvania, LLC

("FoF") ¶¶ 1, 3 (JA190).[4] During the time at issue, Core's customers were all ISPs, which provided Internet connections to users of their Internet services who "dialed up" the ISPs using their telephones. *Id.* ¶¶ 2, 31, 53-57, 68 (JA190, 194, 198, 200). Core's business was to sell telephone lines to ISPs over which Core sent dial-up Internet calls originated by customers of other carriers. *Id.*

Beginning in at least June 2004, AT&T's customers placed calls to Core's ISP customers in order to obtain dial-up access to the Internet. *Id.* ¶¶ 18-20, 35-36 (JA192, 195). All of the calls at issue were "locally dialed." *Id.* ¶¶ 11-16, 54, 60 (JA191-192, 198, 199). This means the calls originated in the same local exchange area in which Core delivered them to its ISP customers. *Id.* ¶¶ 14-16 (JA192).

AT&T's network and Core's network were not directly connected; instead, both were interconnected with the network of the ILEC, Verizon Pennsylvania, Inc. ("Verizon"). *Id.* ¶¶ 6, 46 (JA191, 197). Thus, each call at issue was: (i) originated by an AT&T customer; (ii) delivered by AT&T to Verizon with signaling information telling Verizon to deliver the call to Core; and (iii) delivered by Verizon to Core, which delivered the call to its ISP customer. *Id.* ¶¶ 45-58

("AT&T Commc'n"), was a party. On October 31, 2012, AT&T Commc'n was merged into AT&T Corp. TCG Pittsburgh ("TCG") was also a party in the PUC proceedings. In December 2012, TCG merged into TCA.

[4] The PUC adopted and incorporated the Administrative Law Judge's Findings of Fact. Dec. 5, 2012 Order, at 10 (JA228). At oral arguments in the district court proceeding below, the parties agreed that no further fact-finding was necessary. Memorandum, at 22 (JA22); Tr. Hr'g 119:25-121:2 (JA172-174).

(JA197-198). The signaling message that accompanied the calls contained information identifying the originating carrier (*i.e.*, AT&T) and where (*i.e.*, in what local exchange) the call originated. *Id.* ¶¶ 46-50 (JA197-198). On each of the calls at issue, the message delivered through Verizon to Core identified AT&T as the originating carrier and showed that the call originated in the same local exchange in which Core delivered the call to its ISP customer. *Id.*

Core has never filed with the FCC any tariff that provides for compensation for completing locally dialed ISP-bound traffic, which is jurisdictionally interestate. Dec. 5, 2012 Order, at 59-61 (JA277-279). And there has never been a contract or agreement between AT&T and Core establishing a rate for Core's completion of locally dialed calls ISP-bound calls. *ALJ Initial Decision*, FoF ¶¶ 25, 76-77 (JA193, 201).

B. Core's bills to AT&T

Despite the fact that AT&T began originating calls directed to Core's ISP customers in at least June 2004, Core did not attempt to bill AT&T for any of the calls for nearly four years, until January 2008. *ALJ Initial Decision*, FoF ¶¶ 35-36, 46-50 (JA195, 197-198). After that time, the bills issued by Core purported to cover not only current calls, but all calls dating back to June 2004. *Id.* ¶ 37 (JA195). Core's bills to AT&T reflected the per-minute rate contained in Core's

intrastate switched access tariff for the termination of in-state long distance calls—$0.014/MOU. *Id.* at 1 ¶ 59 (JA180, 199).

AT&T declined to pay these bills because, among other reasons, all of the ISP-bound calls at issue were classified as jurisdictionally interstate in the *ISP-Remand Order*, and thus a state tariff could not be applied to such calls. *Id.* ¶¶ 39-41 (JA196). AT&T also declined to pay these bills because Core's intrastate switched access tariff addresses long distance calls, and the calls at issue—despite being jurisdictionally interstate—were all locally dialed, not long distance. *Id.*

Until 2008, AT&T believed that it and Core were exchanging traffic on a "bill-and-keep" basis since Core failed to bill AT&T. *Id.* ¶ 63 (JA199). AT&T exchanges locally dialed traffic on a bill-and-keep basis with every other CLEC in Pennsylvania. *Id.* ¶¶ 61-63, 65-66 (JA199). AT&T has not received complaints from any other CLEC that bill-and-keep is unacceptable. *Id.* ¶ 65 (JA199).

III. Procedural Background

A. Proceedings before the PUC

On May 19, 2009, Core filed complaints against AT&T Corp. and TCA at the PUC. *ALJ Initial Decision*, at 1 (JA180). The complaints sought compensation for all AT&T-originated, locally dialed ISP-bound calls from June 2004 going forward at the $0.014/MOU rate in Core's intrastate switched access tariff. *Id.* at 1 ¶ 59 (JA180, 199). On December 5, 2012, the PUC issued an

Opinion and Order holding that the *ISP Remand Order* applied to the traffic at issue; that federal law governed the resolution of the dispute; that state law was preempted and "no longer relevant;" and that the PUC had jurisdiction and authority to decide the dispute. Dec. 5, 2012 Order, at 14-15, 80 (JA232-233, 298). The PUC found that it could decide the matter by setting a rate equal to the $0.0007/MOU cap in the *ISP Remand Order*. *Id.* at 82 (JA300). The PUC held that Core was entitled to the $0.0007/MOU rate for all AT&T-originated locally dialed calls to Core's ISP customers beginning on May 19, 2005, four years before Core filed its complaints – pursuant to a state law statute of limitations. *Id.*

AT&T and Core separately petitioned the PUC for reconsideration. Aug. 15, 2013 Order, at 8 (JA310). On August 15, 2013, the PUC issued an Order denying AT&T's petition in its entirety. *Id.* The PUC ordered AT&T to pay Core within 30 days of receipt of an invoice from Core. *Id.* at 63 (JA365).

B. Proceedings before the district court

On August 27, 2013, AT&T moved the district court below for a preliminary injunction, enjoining the enforcement of the PUC Orders. *See* AT&T's Motion for a Preliminary Injunction (D20). AT&T set forth five independent arguments in support of its assertion that the PUC Orders violated federal law:

(1) The PUC did not have jurisdiction to set a rate or require AT&T to pay for the locally dialed ISP-bound calls at issue.

(2) The PUC Orders violated 47 U.S.C. § 203 by awarding charges at a rate not contained in any federal tariff or contract and, therefore, the rate also was "unjust or unreasonable" in violation of 47 U.S.C. § 201.

(3) The PUC Orders violated 47 U.S.C. § 251(b)(5) by allowing Core to recover reciprocal compensation without a reciprocal compensation arrangement.

(4) The PUC Orders impermissibly engaged in retroactive ratemaking by ordering AT&T to pay a rate not set forth in any contract or tariff for a period extending back to 2005.

(5) The PUC erroneously applied a four-year state law statute of limitations, rather than the two-year federal statute of limitations at 47 U.S.C. § 415.

Memorandum, at 22 (JA22). Once AT&T's motion was fully briefed, the district court, Judge Mary A. McLaughlin, heard oral arguments from AT&T, Core, and the PUC. *Id.* at 21 (JA21). At the hearing, the parties agreed that no discovery would be necessary to resolve the case and that the parties had no objection to the court immediately deciding the merits of the case. *Id.* at 21-22 (JA21-22).

On January 31, 2014, Judge McLaughlin issued a Memorandum and Order resolving the case in AT&T's favor and permanently enjoining the enforcement of the PUC Orders. *Id.* at 33 (JA33); *see also* Order (JA34-35, D48). Judge McLaughlin explained that "ISP-bound traffic is characterized by the FCC as 'jurisdictionally interstate'" and "that determination has been affirmed by the D.C. Circuit and the Ninth Circuit." Memorandum, at 23-24 (JA23-24) (citing, *inter*

alia, *ISP Remand Order*, 16 FCC Rcd 9151; *Pac-West*, 651 F.3d at 990; *Core Commc'ns, Inc.*, 592 F.3d at 144).

The district court further recognized that "the FCC's jurisdiction over interstate traffic, under the Communications Act, [is] exclusive." *Id.* at 24-25 (JA24-25). The court explained that the 1996 Act "gave state commissions jurisdiction over interstate traffic in the context of sections 251 and 252 only." *Id.* at 29 (JA29). Accordingly, the PUC "has jurisdiction to establish intercarrier compensation rates for ISP-bound traffic, subject to the rate cap in the *ISP Remand Order*, through its powers in § 252 to approve, mediate, and arbitrate agreements between ILECs and CLECs." *Id.* However, Section 252 "does not give the PPUC authority to establish a rate for ISP-bound traffic between CLECs as it did here." *Id.* Indeed, Judge McLaughlin explained, the 1996 Act "did not give state commissions any general rulemaking authority over interstate traffic." *Id.* at 29-30 (JA29-30) (quoting *MCI Telecomm. Corp.*, 271 F.3d at 516; *Pac Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-26 (9th Cir. 2003) ("*Pac Bell*")).

Judge McLaughlin also rejected Core's argument that the *ISP Remand Order* had delegated jurisdiction to state commissions to set rates according to the compensation scheme in the *Order*. *Id.* at 30-31 (JA30-31). The court found that "[t]he only state authority that the *ISP Remand Order* references is the authority to arbitrate interconnection agreement disputes under § 252." *Id.* at 31 (JA31). The

court also took note of the *ISP Remand Order*'s "intention to limit state commissions' jurisdiction over compensation for ISP-bound traffic specifically." *Id.* at 25 (JA25) (citing *ISP Remand Order*, 16 FCC Rcd at 9189 ¶ 82).

Thus, the district court concluded that the PUC and Core:

> …have not pointed to any authority for the PPUC's exercise of jurisdiction. The PPUC's enabling statute provides that [the] PPUC only has jurisdiction over interstate communication where federal law or the Constitution allows. 66 Pa. C.S.A. § 104. The defendants have not cited any federal statutes, regulations, or Constitutional provisions that give the PPUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here.
>
> The Court finds, therefore, that the PPUC lacked jurisdiction. The FCC has exclusive jurisdiction over interstate communication. ISP-bound traffic, including such traffic exchanged between two CLECs, is categorized as interstate communication for jurisdictional purposes.

Id. at 32 (JA32). Because the District Court found that the PUC "did not have jurisdiction," it held that "the PPUC's orders are invalid" and declined to "reach the merits of AT&T's additional arguments." *Id.* at 23 (JA 23).

SUMMARY OF ARGUMENT

The district court's decision to invalidate the PUC Orders rested on three basic principles, about which there can be no debate:

1. The Communications Act conferred upon the FCC exclusive jurisdiction over interstate communications. That exclusive jurisdiction includes the regulation of rates that carriers charge one another for handling interstate communications. Memorandum, at 22-23 (JA22-23).

2. The traffic at issue in this case—locally dialed ISP-bound traffic—is jurisdictionally interstate. *Id.* at 23-24 (JA23-24).

3. There is no law, regulation, or decision that delegates federal authority to the PUC to set rates for or otherwise regulate locally dialed ISP-bound traffic outside of a Section 252 proceeding. *Id.* at 29-33 (JA29-33).

Although the district court repeatedly asked the PUC and Core whether they could find any authority granting the PUC jurisdiction to set and regulate rates for locally dialed ISP-bound communications (outside of a Section 252 proceeding), Appellants consistently failed to identify any relevant authority. *See id.* at 32 (JA32) ("The defendants [the PUC and Core] have not cited any federal statutes, regulations, or Constitutional provisions that give the PPUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here.").

Unable to point to any authority that grants the PUC ratemaking and regulatory authority over the traffic at issue, Appellants instead pretend that the PUC always possessed such jurisdiction and fault the district court for allegedly failing to show that this supposedly preexisting authority has been preempted. *See* PUC Br. at 16-29; Core Br. at 4-25. The PUC and Core have it exactly backwards. The district court did not rest its holding on a finding that the PUC's authority had been preempted; rather it found that the PUC had no jurisdiction over the traffic at issue in the first place. Memorandum, at 33 (JA33).

But regardless of whether the issue is characterized as one of jurisdiction or preemption, the district court correctly held that the PUC lacked authority to set a rate and require payments for the interstate traffic at issue. Since 1934, the Communications Act has conferred the FCC with exclusive jurisdiction over the rates and regulation of interstate services. Nothing in the 1996 Act altered the exclusivity of the FCC's jurisdiction outside the context of a Section 252 proceeding to arbitrate or enforce an ICA between an ILEC and a CLEC. Because both carriers in this case are CLECs, Section 252 does not apply. Finally, the FCC has never delegated to state commissions ratemaking and regulatory authority over interstate traffic outside of a Section 252 proceeding, whether in the *ISP Remand Order* or anywhere else.

Appellants suggest that the PUC was the only forum available for Core to seek to recover for its termination of locally dialed ISP-bound traffic. However, under the FCC's federal tariffing regime, Core could have negotiated a contract with AT&T covering this traffic or could have filed a federal tariff with the FCC allowing Core to recover for terminating such calls. Core could have sought to enforce such a federal tariff in either the FCC or federal court. However, Core never filed an applicable federal tariff and never entered into a contract with AT&T for the traffic at issue. Core's failure to pursue its options under the FCC's mandatory federal tariffing regime does not create authority in the PUC to set rates

for interstate traffic. The PUC had no jurisdiction over the traffic at issue and its Orders were invalid. The district court's judgment should be affirmed.

In the alternative, the district court's order should be affirmed on one of the other four grounds that the district court was not required to reach. Memorandum, at 22 (JA22). Specifically, the PUC Orders are invalid because they: (1) violate 47 U.S.C. §§ 201 and 203; (2) violate 47 U.S.C. § 251(b)(5); (3) violate the federal prohibition against retroactive ratemaking; and (4) improperly apply a state law four-year statute of limitations instead of the two-year period in 47 U.S.C. § 415(a). The first three arguments support total affirmance. The last argument supports a partial affirmance invalidating the PUC Orders to the extent they require payment for calls terminated outside of the two-year statute of limitations.

ARGUMENT

I. The District Court Correctly Held That The PUC Lacks Ratemaking And Regulatory Jurisdiction Over The Locally Dialed ISP-Bound Traffic At Issue, Which Is Jurisdictionally Interstate.

A. Scope and standard of review.

The district court interpreted federal law in holding that the PUC lacks ratemaking and regulatory authority over interstate traffic outside of a proceeding under Section 252. Memorandum, at 22-33 (JA22-33). Accordingly, this Court's review is "plenary." *See MCI Tele. Corp.*, 271 F.3d at 515. This Court also

affords no deference to the PUC's interpretation of federal law, whether contained in the PUC Orders or elsewhere. *Id.* at 517.

B. Neither the Communications Act, the 1996 Act, nor the FCC have delegated jurisdiction to the PUC to set rates or otherwise regulate interstate traffic outside of a Section 252 proceeding.

The district court below applied well-established authority in holding that locally dialed ISP-bound traffic, the traffic at issue in this case, is "jurisdictionally interstate." Memorandum, at 23-24 (JA23-24) (citing *ISP Remand Order*, 16 FCC Rcd at 9175 ¶ 52; *Petition of Core Comm., Inc. for Forbearance under 47 U.S.C. § 160(c) From Application of the ISP Remand Order*, 19 FCC Rcd 20179, 20180-81 ¶ 4 (2004) ("*Core Forbearance Order*"); *ISP Mandamus Order*, 24 FCC Rcd at 6485, n.69; *Pac-West*, 651 F.3d at 990). The district court further recognized that the FCC has exclusive jurisdiction over interstate communications. *Id.* at 24-25 (JA24-25). Applying these principles, the court held that the PUC lacked jurisdiction to set a rate for and regulate the traffic at issue. *Id.* at 33 (JA33).

Instead of identifying any authority allowing the PUC to make rates and regulate interstate calls, Appellants instead *assume* the PUC has such jurisdiction and pretend that the district court rested its holding on a finding that the PUC's supposed authority had been preempted. PUC Br. at 16-29; Core Br. at 4-25. The PUC and Core are wrong. The district court's holding did not rest on preemption, but on the PUC's lack of jurisdiction. Memorandum, at 29-33 (JA29-33).

In any event, whether described as a jurisdiction or preemption issue, the PUC lacks ratemaking and regulatory authority over interstate traffic. The Communications Act confers such jurisdiction exclusively in the FCC. And the 1996 Act did not alter the exclusivity of the FCC's jurisdiction, except with respect to proceedings under Section 252, which does not apply here because both carriers are CLECs. Nor has the FCC delegated its authority over interstate services to state commissions, whether in the *ISP Remand Order* or anywhere else. Accordingly, the PUC Orders are invalid, and the district court should be affirmed.

1. The Communications Act does not give the PUC ratemaking or regulatory jurisdiction over interstate traffic.

The Communications Act of 1934 created a well-established division in regulatory authority under which the FCC has jurisdiction to set rates for and regulate interstate traffic (47 U.S.C. § 152(a)) and states have jurisdiction over intrastate communications (47 U.S.C. § 152(b)). As the district court recognized, settled judicial authority holds that the Communications Act endows the FCC with exclusive jurisdiction over interstate communications. Memorandum, at 24-25 (JA24-25) (citing, *inter alia*, *Crockett Tel. Co. v. F.C.C.*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("*NARUC*") ("Interstate communications are totally entrusted to the FCC ..."); *Ivy Broadcasting*

Co. v. American Tel. & Tel. Co., 391 F.2d 486, 491 (2d Cir. 1968) ("[Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and the states are precluded from acting in this area.")).

The FCC also has recognized the exclusivity of its jurisdiction over interstate communications. *See id.* at 26-27, n.8 (JA26-27) (citing *In re Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22412 ¶ 16 (2004) ("Congress has given the Commission exclusive jurisdiction over 'all interstate and foreign communication' and 'all persons engaged ... in such communication.'"); *In re Applications of Mobile Telecomm. Tech. Corp. U.S. Central, Inc.*, 6 FCC Rcd 1938, 1941 ¶ 15, n.16 (1991) ("The Act grants this Commission exclusive authority to regulate the charges and services of interstate common carriers."); *In re AT&T Co. and the Assoc. Bell Sys. Cos.*, 56 F.C.C.2d 14, 20 ¶ 21 (1975) ("[T]he States do not have jurisdiction over interstate communications.")).

Pennsylvania courts also recognize this rule, holding that "the PUC does not have jurisdiction over interstate telecommunications services." *MilleniaNet v. Pa. Pub. Util. Comm'n*, No. 990 C.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 786, at *6, 2009 WL 9104922, at *2 (Pa. Commw. Ct. Apr. 30, 2009).

Because the traffic at issue in the PUC Orders is jurisdictionally interstate, the district court found that the Communications Act gave the FCC exclusive

ratemaking and regulatory jurisdiction over that traffic. Memorandum, at 24-25 (JA24-25). Nonetheless, Core takes the position in its brief that CLECs are "creatures of state law" that are certified by the PUC and that the PUC therefore has "plenary jurisdiction" over CLECs. Core Br. at 4-6. To be sure, the PUC has broad regulatory powers *vis a vis* Pennsylvania public utilities, including CLECs certificated to operate in Pennsylvania. But that power is not without limits. No one could—or would—contend that the PUC has the power to regulate all aspects of a CLEC's business. Everyone would concede, for example, that the PUC cannot regulate the wages a CLEC pays its employees.

Nor would anyone contend that the PUC has the power to set or regulate the rate a CLEC charges a long-distance carrier for originating or terminating an interstate long distance call. That power is exclusively vested in the FCC—precisely because the exchange access service is an *interstate* service rendered in connection with an *interstate* communication. And it is well-established that state commissions lack jurisdiction over disputes involving subparts of an interstate call, even if a subpart occurs entirely within a single state. *See, e.g.*, *NARUC*, 746 F.2d at 1498 ("The dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines.'"). The same is true with

respect to the traffic at issue here; because it is interstate, the power to set rates belongs exclusively to the FCC.

Moreover, the PUC itself is a "creature[] of state law" and thus has only those powers specifically conferred on it by the Pennsylvania legislature in its enabling statute. With respect to interstate communications, that statute limits the PUC's jurisdiction to regulate only where a federal statute, regulation or Constitutional provision expressly confers jurisdiction on the PUC. 66 Pa. C.S.A. § 104. As the district court found, Appellants "have not cited any federal statutes, regulations, or Constitutional provisions that give the PPUC jurisdiction over ISP-bound traffic." Memorandum, at 32 (JA32).

2. The 1996 Act does not give the PUC ratemaking or regulatory jurisdiction over interstate traffic outside of a Section 252 proceeding.

Core appears to concede that, prior to the 1996 Act, the FCC did in fact possess exclusive jurisdiction to set and regulate rates for interstate communications. Core Br. at 7. Core suggests, but never really explains how, the 1996 Act altered the FCC's exclusive jurisdiction. *Id.* Core is correct that the 1996 Act shifted the balance of authority between federal and state regulators, but is incorrect in suggesting that the Act confers state commissions with general jurisdiction to set and regulate interstate rates. Core's understanding of the 1996 Act is mistaken in at least three crucial ways.

First, the 1996 Act *federalized* an area that formerly had been the exclusive province of state law, local telephone competition. The Supreme Court made this clear in its landmark 1996 *I.U.B.* opinion. *See I.U.B.*, 525 U.S. at 378 n.6 ("… the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."). This Court's 2001 *MCI* opinion confirmed that the 1996 Act "federalized the regulation of competition for local telecommunications service." *MCI Tele. Corp.*, 271 F.3d at 509. Accordingly, "[t]he Act preempted the regulation of interconnection agreements and of the terms on which a CLEC can provide competitive local service." *Id.* at 509-10; *see also id.* at 510 (the 1996 Act "validly preempted state regulation over competition to provide local telecommunications service"). Accordingly, any purported "plenary" regulatory authority of the PUC over CLECs was validly preempted by the 1996 Act with respect to all matters addressed by the Act.

Second, while the 1996 Act carved out a role for state commissions to play in regulating local telephone competition, that role was expressly limited to implementing the new federal regime. *See I.U.B.*, 525 U.S. at 378 n.6. That role is specifically delineated in Sections 251 and 252. Under those provisions, state commissions, if they choose to participate, may act as "deputized federal

regulators," applying delegated federal authority to implement the statutory regime. *Ill. Bell*, 222 F.3d at 344. As this Court recognized in 2001:

> Because Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity. The state commission's authority to regulate comes from § 252(b) and (e), not from its own sovereign authority. Regulating local telecommunications competition under the 1996 Act no longer is … an "otherwise lawful" or "otherwise permissible" activity for a state. Rather, it is an activity in which states and state commissions are not entitled to engage except by the express leave of Congress.

MCI Tele. Corp., 271 F.3d at 510 (citations omitted). Accordingly, the state commissions' role in the federal scheme is limited to that set forth in the statute—arbitrating, approving, and enforcing ICAs between ILECs (the erstwhile local monopolists) and CLECs (the new entrants). 47 U.S.C. §§ 251, 252.

Third, in the course of arbitrating, approving, and enforcing ICAs, one of the requirements that the state commissions must implement is that embodied in Section 251(b)(5)—the requirement that the ICA include an arrangement providing for reciprocal compensation for the termination of telecommunications traffic. 47 U.S.C. § 251(b)(5). Some of this traffic may be interstate, including the kind of traffic at issue here (locally dialed ISP-bound calls). Thus, in its role as a "deputized federal regulator" implementing the federal scheme in a Section 252 proceeding, a state commission may be required to set a rate for such traffic, consistent with the FCC's rules implementing the 1996 Act (including the rules in

the *ISP Remand Order*). But this is the *only* occasion in which a state commission may set a rate for the type of jurisdictionally interstate traffic at issue here.

Under Sections 251(c) and 252, state commissions are empowered to arbitrate, approve, and enforce ICAs between ILECs and CLECs only. 47 U.S.C. §§ 251(c), 252. Core contends, however, that because Sections 251(c) and 252 say nothing about state commission regulation of CLEC-CLEC "interactions," Congress by its silence signaled its intention to permit state commissions to engage in *greater* regulation of CLEC-CLEC "interactions" than permitted in the case of ILEC-CLEC agreements. Core Br. at 9-10. Viewed charitably, that argument flies in the face of the established law holding that, with respect to matters addressed by the 1996 Act, state commissions have only those powers expressly delegated by Sections 251 and 252.[5] *See, e.g.*, *MCI Tele. Corp.*, 271 F.3d at 511 ("State commissions now exercise power over local competition … only to the extent and in the manner provided by Congress."). Under this established law, state

[5] While the FCC has held that state commissions have implied authority to hear disputes about breaches of the ICAs between ILECs and CLECs as a necessary corollary of their authority to approve ICAs (*see Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277 ¶ 6 (2000)), Congress did not give state commissions *any* role in addressing the manner in which two CLECs comply with the duties in Section 251(b), so there is no express authority from which to imply further authority.

commissions have no general ratemaking or regulatory power over local telephone markets outside of a Section 252 proceeding:

> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking ... State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

Id. at 516; *see also Pac Bell*, 325 F.3d at 1127 (same).

The federal scheme does not delegate *any* authority to state commissions to regulate the interactions between two CLECs, including in particular the exchange of interstate traffic that falls under Section 251(b)(5). The fact that Sections 251 and 252 are silent about CLEC-CLEC "interactions" demonstrates that state commissions have no authority over those interactions. In Section 251(b), Congress imposed duties on both ILECs and CLECs, but only gave state commissions a role in enforcing the specific duties imposed on ILECs (i.e., the duties in Section 251(c) to negotiate and interconnect with competing carriers). *See* 47 U.S.C. § 252. Thus, the statute forecloses the possibility of an *implied* role for state commissions with regard to disputes between CLECs. *See, e.g.*, *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7 (1st Cir. 2007) (under Section 271 of the 1996 Act, "states have no more than a right to express views" about the duties of former Bell Operating Companies and that "explicit

consultative role under section 271, works against, rather than for, their claim of other powers").

Because the 1996 Act did not grant states any authority over intercarrier compensation disputes between CLECs, such disputes are still subject to the background rule, in place since the passage of the Communications Act in 1934, that the FCC has exclusive jurisdiction over interstate communications. *See Crockett Tel.*, 963 F.2d at 1566.

Both the PUC and Core purport to rely upon 47 U.S.C. § 251(d)(3), which preserves certain preexisting state regulations establishing "access and interconnection obligations" for LECs. Core Br. at 10-11; PUC Br. at 20. As an initial matter, neither the PUC nor Core mentioned Section 251(d)(3) in their filings before the district court, so the argument has been waived. *See Gass v. Virgin Islands Telephone Corp.*, 311 F.3d 237, 246 (3d Cir. 2002) ("failure to raise an issue in the district court constitutes a waiver of the argument").

Moreover, nothing in Section 251(d)(3) purports to grant state commissions new, generalized authority over interstate services. Rather, Section 251(d)(3) is phrased not as a grant of authority to states, but as a limitation on the authority of the FCC to interfere with *existing* state authority, which extended only to intrastate traffic. State commissions did not have authority to establish "access and interconnection obligations" for interstate services such as ISP-bound traffic prior

to 1996, and they did not receive it thereafter. *See, e.g.*, *I.U.B.*, 525 U.S. at 378 n.6; *see also Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd 15499, 15550 ¶ 98 (1996) (subsequent history omitted) ("*Local Competition Order*") ("[w]e conclude that state access and interconnection obligations referenced in section 251(d)(3) fall within the scope of section 261(c)," which permits state commissions to impose requirements "for *intrastate* services" that are necessary to promote competition, as long as they are not inconsistent with the 1996 Act and the FCC's rules (emphasis added)).[6]

Moreover, when faced with this exact argument, the Ninth Circuit flatly rejected the idea that Section 251(d)(3)—and other analogous sections of the 1996 Act that purport to "preserve" state authority—grants regulatory authority to state commissions with respect to interstate communications outside of Section 252:

> These provisions are best interpreted, however, as indicating that state regulatory commissions may continue to regulate *aspects of intrastate telecommunications service*, as long as the state requirements are not inconsistent with the pro-competitive intent of the Act. To do otherwise would undercut the purposes of § 251 and § 252—to replace a state regulated system with a market-driven system that is self-regulated by binding interconnection agreements—and also would be inconsistent with the more specific requirements of the Act. For example, § 251(d)(3)(C) limits state commission actions under

[6] In addition, Section 251(d)(3) does not apply here because nothing in the PUC Orders purports to establish an "obligation" on the part of AT&T to provide "access" or "interconnection" to its network. On the contrary, AT&T and Core have been indirectly interconnected through the ILEC, Verizon, at all relevant times. *ALJ Initial Decision*, FoF ¶¶ 6, 46 (JA191, 197).

> § 251(d)(3) to those that do not "substantially prevent implementation of the requirements of this section and the purposes of this part."

Pac Bell, 325 F.3d 1128 (emphasis added).

Core also cites and discusses three Circuit Court decisions which it claims show that state commission possess the power to set and regulate rates for ISP-bound communications. Core Br. at 15-18 (citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006) ("*Global NAPs I*"); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006) ("*Global NAPs II*"); and *Verizon California, Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006)). These cases are irrelevant to the dispute here.

Global NAPs I and *II* involved affirmance of state commission arbitrations under Section 252 between a CLEC and an ILEC. *Global NAPs I*, 444 F.3d at 61-68; *Global NAPs II*, 454 F.3d at 93-94. In both cases, the state commission in implementing Section 251(b)(5) required the CLEC to pay originating access charges (under state tariffs) for interexchange (long distance) ISP-bound communications. *Global NAPs I*, 444 F.3d at 75-76; *Global NAPs II*, 454 F.3d at 103. The rationale appears to have been that the rate cap in the *ISP Remand Order* applies only to *locally dialed* ISP-bound traffic. *Global NAPs I*, 444 F.3d at 75; *Global NAPs II*, 454 F.3d at 97. While one could certainly question the correctness of the courts' view of the scope of the *ISP Remand Order*, the pertinent

fact is that in setting a rate for this traffic the commissions were operating under their delegated authority from Section 252 as "deputized federal regulators."

Peevey also involved a Section 252 proceeding. 462 F.3d at 1145-46. There, the commission was asked to interpret and enforce an interconnection agreement between a CLEC and an ILEC. *Id.* The commission found that the agreement provided that the CLEC would pay an originating fee for interexchange (long distance) ISP-bound calls. *Id.* at 1149-50. The Ninth Circuit affirmed this decision. *Id.* at 1157-59. Again, the commission was clearly acting pursuant to its delegated authority as a "deputized federal regulator." None of these cases says anything about a state commission's power to set a rate for locally dialed ISP-bound communications in a dispute between two CLECs who have no agreement.[7]

[7] Core also briefly cites the Eighth Circuit's decision in *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006) ("*I.N.S.*"), but that case provides it with no support. Core Br. at 9. In that case, the state commission compelled two transit carriers (carriers that deliver traffic from one carrier's network to another carrier's network) to negotiate an agreement that would set a reciprocal compensation rate for calls originating with a wireless carrier and terminating to a LEC. *I.N.S.*, 466 F.3d at 1094. However, neither carrier in *I.N.S.* was a LEC, much less a CLEC, so neither was subject to the duties in Section 251(b)(5). Therefore, the state commission was *not* enforcing an obligation created by the 1996 Act outside a Section 252 proceeding. Moreover, the traffic at issue in *I.N.S.* was "'intrastate,' not 'foreign or interstate.'" *Id.* at 1095. In contrast, the locally dialed ISP-bound traffic at issue here is jurisdictionally *interstate*. Whatever authority a state commission might have to compel agreements governing *intrastate* traffic is thus inapplicable. *See* 47 U.S.C. § 152(a) (FCC has exclusive jurisdiction over interstate communications).

Finally, Core appears to argue that locally dialed ISP-bound traffic is "jurisdictionally-mixed," rather than jurisdictionally interstate. Core Br. at 20-21. Core is flatly incorrect. The FCC and the federal courts repeatedly have held that this traffic is purely jurisdictionally interstate. Memorandum, at 23-24 (JA23-24) (citing *ISP Remand Order*, 16 FCC Rcd at 9175 ¶ 52; *Core Forbearance Order*, 19 FCC Rcd at 20180-81 ¶ 4; *ISP Mandamus Order*, 24 FCC Rcd at 6485, n.69; *Core Commc'ns, Inc.*, 592 F.3d at 144; *Pac-West*, 651 F.3d at 990).

In the *ISP Remand Order*, the FCC specifically found that any intrastate traffic destined for ISPs cannot be "reliably separated" from the interstate traffic—i.e., calls that reach websites located outside the dialing party's state. *ISP Remand Order*, 16 FCC Rcd at 9175 ¶ 52. Accordingly, under governing law, the traffic is purely jurisdictionally interstate. *See Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir. 2004) (traffic is interstate and falls under FCC jurisdiction "where it is not possible to separate the interstate and intrastate aspects of a communications service"). Accordingly, all of the traffic at issue is subject to the FCC's exclusive ratemaking and regulatory jurisdiction. *See NARUC*, 746 F.2d at 1498 ("dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities'").

3. The FCC has not given the PUC ratemaking or regulatory jurisdiction over interstate traffic outside of a Section 252 proceeding.

The PUC and Core both argue that the district court's holding was erroneous because the *ISP Remand Order* allegedly did not preempt state authority to set rates for locally dialed ISP-bound traffic outside of a Section 252 proceeding. PUC Br. at 23-29; Core Br. at 21-25. However, as explained above, neither the Communications Act nor the 1996 Act authorized the PUC to assert ratemaking and regulatory authority over this traffic in the first place. And the FCC did not delegate to state commissions its jurisdiction over the interstate traffic at issue here, whether in the *ISP Remand Order*, or anywhere else.

The district court correctly found that the *ISP Remand Order* "says nothing about authorizing a state commission to set a rate" under the $0.0007/MOU rate cap and "[t]he only state authority that the *ISP Remand Order* references is the authority to arbitrate interconnection agreement disputes under § 252." Memorandum, at 31 (JA31). Nothing in the *ISP Remand Order* suggested an intent by the FCC to delegate authority to state commissions to set rates for interstate traffic other than in a Section 252 proceeding. To the contrary, the FCC noted that prior to "adoption of a federal rule," "state commissions *exercising their authority under section 252* to arbitrate, interpret, and enforce interconnection agreements would determine whether and how interconnecting carriers should be

compensated for carrying ISP-bound traffic." *Id.* at ¶ 15 (emphasis added). The FCC also made expressly clear that, because it was exercising its authority over compensation for this interstate traffic, "state commissions will no longer have authority to address this issue." *Id.* at 9189 ¶ 82.

In fact, in its subsequent *ISP Mandamus Order*, the FCC specifically explained that it had "not delegate[d] its authority in the *ISP Remand Order*, but rather provided options that were not mandatory" (i.e., it constrained state commissions' existing authority to set rates in Section 252 proceedings). *ISP Mandamus Order*, 24 FCC Rcd at 6489 ¶ 27 n.103.

Ignoring the FCC's clear pronouncement that the *ISP Remand Order* did not delegate any additional jurisdiction to state commissions, the PUC and Core rely heavily on the *Amicus Brief* the FCC submitted in the *Pac-West* case. PUC Br. at 24-25; Core Br. at 21-22. But the *Amicus Brief* provides them with no support.

Pac-West involved a dispute between two CLECs, Pac-West and AT&T. 651 F.3d at 988-89. Pac-West terminated calls from AT&T's customers to Pac-West's ISP customers. *Id.* at 988-89. Pac-West filed a complaint with the CPUC alleging that AT&T owed it reciprocal compensation for terminating the ISP-bound traffic. *Id.* at 989. The CPUC ordered AT&T to pay Pac-West for such traffic at the rate in Pac-West's intrastate long distance tariff, which exceeded the

rate cap in the *ISP Remand Order*. 651 F.3d at 989-90. AT&T appealed to the district court and the Ninth Circuit, where the FCC filed its *Amicus Brief*.

In its *Amicus Brief*, the FCC advised the Ninth Circuit that state commissions "lawfully could not apply and enforce state-tariffed rates that conflict with federal law." *Amicus Brief*, at 29 (JA401). Thus, the FCC explained, the Ninth Circuit could invalidate "the CPUC's resolution of the dispute under state law on the grounds of federal pre-emption" and "need not decide whether the CPUC has jurisdiction to adjudicate the dispute in this case applying federal law." *Id.* The FCC declined to "take a position on this issue" because it "has not directly spoken to the broader jurisdictional issue in its rules and orders." *Id.*[8]

However, the fact that the FCC did not "take a position" on the issue in the *Amicus Brief* and has not yet "directly spoken" to the issue in its "rules and orders" does not mean that the issue has somehow been left "open." Nor does it alter the long-standing FCC determination (affirmed by the courts) that locally dialed ISP-bound traffic is jurisdictionally interstate. *See ISP Remand Order*, 16 FCC Rcd at 9175 ¶ 52. This means, necessarily, that ratemaking for and regulation of this ISP-bound traffic falls within the exclusive jurisdiction of the FCC, and that state

[8] The PUC also argues that the FCC's interpretation of the *ISP Remand Order* in its *Amicus Brief* is "entitled to deference." PUC Br. at 21-22. However, the FCC declined to take a stand on the "broader jurisdictional issue," so there is no opinion in that filing to which this Court could defer. *Amicus Brief*, at 29 (JA401).

commissions have no jurisdiction to set and apply rates for such traffic outside of a Section 252 proceeding.

Core also relies on the sections of the FCC's *Amicus Brief* that found that the rate cap in the *ISP Remand Order* applies to CLEC-CLEC traffic. Core Br. at 21-22. The FCC explained in its *Amicus Brief* that the preemptive effect of the federal rate cap is not limited to ICAs arbitrated or negotiated between an ILEC and a CLEC under Section 252. *Amicus Brief*, at 15-29 (JA387-401). However, nothing in the *Amicus Brief*, or anywhere else, purports to delegate additional authority to state commissions to set rates *outside of a Section 252 proceeding*, regardless of whether the rates set were at or lower than the cap. To the contrary, the FCC has specifically explained that it did "not delegate its authority in the *ISP Remand Order*." *ISP Mandamus Order*, 24 FCC Rcd at 6489 ¶ 27 n.103.

Core also cites language from the FCC's 2008 *ISP Mandamus Order* contemplating that state commissions will "establish reciprocal compensation rates that are at or below $.0007 per minute-of-use." *Id.* at 25 (quoting *ISP Mandamus Order*, 24 FCC Rcd at 6584-85 ¶ 198). However, this language merely parrots the requirements of the *ISP Remand Order*, which limited *existing* state commission authority to set rates in Section 252 proceedings, rather than delegating *additional* authority to set such rates outside of a Section 252 proceeding. *See id.* at 6489 ¶ 27 n.103 (FCC did not delegate authority to states in the *ISP Remand Order*).

Accordingly, neither the *ISP Remand Order* nor the FCC's *Amicus Brief* cede additional jurisdiction to state commissions. And, under the 1996 Act, state commissions are not permitted to "[r]egulate local telecommunications competition … except by the express leave of Congress." *MCI Tele. Corp.*, 271 F.3d at 510 (citations omitted). Appellants have not identified any act of Congress or the FCC that gave the PUC jurisdiction over the traffic at issue in this case. *See* Memorandum, at 32 (JA32).

Finally, the PUC argues that it did not "engage in rate setting, rate making, or conducting an ISP traffic 'rulemaking'" in the PUC Orders, because it merely applied the $0.0007/MOU federal "rate." PUC Br. at 23. That argument is absurd. The $0.0007/MOU number is the FCC's cap or ceiling on what can be imposed for locally dialed ISP-bound calls in a Section 252 proceeding. *ISP Remand Order*, 16 FCC Rcd at 9188 ¶ 80. It is *not* a "federal rate." In fact, it is not a rate at all; and it certainly is not self-executing. Carriers can voluntarily agree to bill each other at *any* rate for this traffic, including using a "bill-and-keep" system in which neither carrier pays the other for the traffic. *See* 47 U.S.C. § 252(e)(2)(A). In addition, when a state commission arbitrates the terms of an ICA under Section 252, the commission is free to impose rates *lower* than the $0.0007/MOU ceiling for this traffic, including imposing bill-and-keep. *ISP Remand Order*, 16 FCC Rcd at 9188

¶ 80.[9] Accordingly, the PUC clearly engaged in "ratemaking" when it purported to set the $0.0007/MOU number as the applicable rate and required AT&T to pay Core at that rate for calls dating back to 2005.

Core does not deny that the PUC set a rate for the traffic at issue, but instead attempts to minimize the PUC's actions by arguing that the PUC "merely designated a rate," which Core describes as a "modest regulatory action." Core Br. at 25. Whether described as "setting" a rate or "designating" a rate, the PUC lacked jurisdiction to do so with respect to the interstate traffic at issue.

If Core wished to have a rate set for the interstate traffic at issue, it could have negotiated a contract with AT&T or filed a tariff with the FCC setting such a rate. *See* 47 U.S.C. § 203; *All Am.*, 28 FCC Rcd at 3494 ¶ 37.[10] Core could have

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[9] In November 2011, the FCC issued an order requiring intercarrier compensation between price cap LECs (including compensation for terminating ISP-bound traffic) to transition to a mandatory bill-and-keep model over seven years, from 2011 to 2018. *In re Connect Am. Fund*, 26 FCC Rcd 17663 ¶¶ 9 & 33-42 (2011) ("*Connect America Fund Order*"). On May 23, 2014, the Tenth Circuit upheld the *Connect America Fund Order* and specifically upheld the FCC's transition to a bill-and-keep system. *In re FCC 11-161*, --- F.3d ---, 2014 WL 2142106, at *78-94 (10th Cir. May 23, 2014).

[10] Before the district court, Core argued that the FCC has refused to accept tariffs for ISP-bound traffic and that charges for such traffic "cannot be tariffed at the FCC." Core Resp. Br. at 27-28 (D27 at 26-28). Core cited two cases to support that argument, but neither case supported its position. *Id.* (citing *Global NAPs v. FCC*, 247 F.3d 252 (D.C. Cir. 2001); *Global NAPs v. FCC*, 80 F. App'x 114 (D.C. Cir. 2003)). In the *Global NAPs* cases that it cited, the FCC rejected the tariff filings as deficient under the FCC's procedural rules. *See Global NAPs*, 247 F.3d at 252 (rejecting tariff that was not self-contained); *Global NAPs*, 80 F. App'x at

sought to enforce a federal tariff in the FCC or federal court. *Brown*, 277 F.3d at 1173; 47 U.S.C. § 207. But Core neglected to negotiate a contract or file a tariff. And Core's neglect does not create ratemaking or regulatory jurisdiction in the PUC with respect to interstate traffic. The PUC had no such jurisdiction here, and the district court's holding should be affirmed.

C. The district court did not provide the PUC with insufficient notice of the FCC's exclusive jurisdiction over rates for interstate traffic.

In its final argument, the PUC appears to assert that the district court erred by deciding that the district court itself did not have authority to set a rate for the traffic at issue and by allegedly failing to provide timely notice of this fact to the PUC. PUC Br. at 29-31. As an initial matter, there was nothing "untimely" about the argument. AT&T repeatedly raised the FCC's exclusive jurisdiction before the PUC (*see, e.g.*, Dec. 5, 2012 Order (JA239) ("AT&T also argues that Congress granted the FCC exclusive jurisdiction over all interstate and foreign communications…")), and in its briefs in the district court (*see* Brief in Support of Motion for Preliminary Injunction (D20-2 at 20-23); Reply Brief (D30 at 7-11)).

Moreover, contrary to the PUC's impression, the district court did not "later conclude[] that it lacked subject matter jurisdiction over the substantive issues

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114 (rejecting tariff with indeterminate language). The FCC has *never* held that charges for terminating locally dialed ISP-bound traffic cannot be included in a federal tariff. Indeed, if that were the case, the FCC would not have needed to examine the procedural niceties of Global NAPs' tariffs.

addressed by the Pa PUC." PUC Br. at 30. Rather, AT&T asked the district court to determine whether the PUC Orders violated federal law. The district court undoubtedly possessed and exercised jurisdiction over that question under 28 U.S.C. § 1331.

In addition, to the extent that the PUC's argument relates to Core's counterclaims against AT&T, which had asked the district court to set an applicable rate, Core abandoned those counterclaims (Core Br. at 2 n.1).

Finally, the PUC asks this Court to "provide it with the opportunity for FCC guidance in the form of its Petition for Declaratory Order." PUC Br. at 31. But this Court already denied the PUC's request to stay this case pending the FCC's resolution of its Petition. *See* May 22, 2014 Order. The PUC presents no new arguments and, to the extent it is renewing its request to stay this appeal, that request should be denied.

II. The District Court's Holding Should Be Affirmed Also Under AT&T's Four Alternative Arguments.

A. Scope and standard of review.

The district court declined to reach AT&T's four alternative arguments because the court held the PUC Orders invalid for lack of jurisdiction. Memorandum, at 22-23 (JA22-23). Thus, this Court's review of the alternative arguments is "plenary." *MCI Tele. Corp.*, 271 F.3d at 515. This Court also affords no deference to the PUC's interpretation of the relevant federal law. *Id.* at 517.

B. The PUC Orders violate 47 U.S.C. §§ 201 and 203 because they allow Core to collect charges for interstate services at a rate that is not contained in any tariff or contract.

Even if the PUC had jurisdiction to resolve the underlying dispute in this case (as shown *supra* in § I(B), it did not), the PUC Orders still violate federal law, including 47 U.S.C. § 203, which requires carriers to tariff their rates for services that are not otherwise covered by a contract. The PUC Orders also violate the prohibition in 47 U.S.C. § 201 against "unjust and unreasonable" charges.

A CLEC like Core is permitted to assess charges on jurisdictionally interstate traffic (like the traffic at issue in this case) in one of two ways: either by filing a federal tariff or by negotiating a contract with the other carrier. As the FCC recently reaffirmed, in the absence of a filed tariff or a contract, a CLEC "lacks authority" to charge for interstate services. *All Am.*, 28 FCC Rcd at 3494 ¶ 37 ("[U]ntil a CLEC files valid interstate tariffs ... or enters into contracts" for interstate services, "it lacks authority to bill for those services."). The analysis in *All Am.* is dispositive of this issue. In that case, the FCC rejected the idea that a CLEC could bill for interstate services without a federal tariff or contract covering the services. *See also In re Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 FCC Rcd 8332, 8335 ¶ 6 (2011) ("*N. Valley Commc'ns*") ("CLECs may impose interstate access charges either through tariffs or contracts.").

Core has never had any contract or agreement permitting it to charge AT&T for the traffic at issue. *ALJ Initial Decision*, FoF ¶¶ 25, 76-77 (JA193, 201). In the absence of a contract or agreement, Core was required to file a federal tariff establishing a rate for such traffic (47 U.S.C. § 203(a)), and it was prohibited from charging any rate other than one established in its tariff (47 U.S.C. § 203(c)(1)). But Core never filed a tariff covering the traffic at issue. Dec. 5, 2012 Order, at 59-61 (JA277-279). Nonetheless, the PUC Orders authorized Core to charge AT&T for traffic exchanged in the absence of a governing contract or tariff dating back to 2005. *Id.* at 82 (JA300). Accordingly, the PUC Orders violate 47 U.S.C. § 203 by allowing Core to charge for this traffic.

In addition, 47 U.S.C. § 201(b) prohibits "unjust and unreasonable" charges. A CLEC violates this statute by charging a rate that is not established in either a filed tariff or a negotiated contract because such charges are, by definition, "unjust and unreasonable." *N. Valley Commc'ns*, 26 FCC Rcd at 8335-36 ¶ 7 (CLEC violated Section 201(b) by charging rates not contained in a valid tariff). Because Core has no tariff or contract allowing it to charge AT&T for locally dialed ISP-bound traffic, the PUC Orders violate Section 201(b) by allowing Core to charge for that traffic.

C. The PUC Orders violate 47 U.S.C. § 251(b)(5).

The PUC Orders also violate 47 U.S.C. § 251(b)(5), which obligates all LECs, including Core, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." This provision on its face is not self-executing. That is, nothing entitles Core to § 251(b)(5) compensation unless and until it "establish[es]" an "arrangement[]" for such compensation. Core has never had a contract, tariff or other arrangement establishing compensation for the traffic at issue. *ALJ Initial Decision*, FoF ¶¶ 25, 76-77 (JA193, 201). The PUC Orders nevertheless purported to allow Core to recover Section 251(b)(5) charges. That is inconsistent with the plain language of the statute.

In a 2005 Order, the FCC addressed "whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers." *Unified Intercarrier Compensation Regime*, 20 FCC Rcd at 4857 ¶ 4. The FCC ultimately found that, in the absence of an ICA, a tariff is a permissible means to establish a reciprocal compensation arrangement under Section 251(b)(5). *Id*. at 4860-61 ¶¶ 9-10. The FCC explained, "[i]n light of existing carrier disputes, we find it necessary to clarify the *type of arrangements necessary to trigger payment obligations*." *Id*. at 4860 ¶ 9 (emphasis added). And "[b]ecause the existing rules do not explicitly preclude tariffed compensation arrangements, we find that ...

LECs [a]re not prohibited from filing ... tariffs ... [and] providers [a]re obligated to accept the terms of applicable ... tariffs." *Id*.

The FCC's language referring to "the type of arrangements necessary to trigger payment obligations" supports the notion that Section 251(b)(5) is not self-executing, but requires some sort of "arrangement" before payment obligations are triggered. *Id.* To this day, however, Core has not filed a valid federal tariff or entered into any compensation arrangement with AT&T that would trigger the reciprocal compensation payment obligations of Section 251(b)(5) as to the locally dialed ISP-bound traffic at issue. In the absence of an established compensation arrangement, the PUC erred in finding that Core is entitled to charge AT&T for termination of that traffic both prospectively and for past traffic exchanges.

D. The PUC Orders violate the federal prohibition against retroactive ratemaking.

By applying a $0.0007 rate for calls delivered beginning in 2005 in the absence of any contract or tariff containing such a rate, the PUC Orders violated the federal rule against retroactive ratemaking. *TRT TeleCommunications Corp. v. FCC*, 857 F.2d 1535, 1547 (D.C. Cir. 1988) ("the rule against retroactive rate increases is one that emerges from Sections 201-205 of the Communications Act."); *see also Qwest Corp. v. Koppendrayer*, 436 F.3d 859, 863-64 (8th Cir. 2006). Without a tariff or contract covering the traffic at issue, Core has not lawfully established a rate and it cannot charge any non-zero rate for that traffic.

The PUC Orders authorizing a rate of $0.0007/MOU therefore violate the prohibition on retroactive ratemaking.

Before the district court, the PUC's only answer to this argument was to pretend that the FCC's *cap* of $0.0007 established in 2001 was actually a mandatory *rate*, and therefore that applying that rate back to May 2005 is not retroactive ratemaking. Aug. 15, 2013 Order at 60-62 (JA362-364). But the FCC's cap is not a uniform, nationwide rate that the FCC established for all carriers to charge – it is only a ceiling on rates that may be established by state commissions in Section 252 proceedings. *ISP Remand Order*, 16 FCC Rcd at 9188 ¶ 80. It is not self-executing and carriers are not allowed to charge the rate cap in the absence of a contract or tariff authorizing that rate. *Id.*; *see also All Am.*, 28 FCC Rcd at 3494 ¶ 37 (requiring a tariff or contract before a CLEC can charge for intercarrier compensation).

E. The PUC Orders violate federal law by applying a state law four-year statute of limitations, instead of the two-year period in 47 U.S.C. § 415.

Even if the PUC Orders were not otherwise invalid, the Orders also violate federal law by erroneously applying a four-year state statute of limitations to Core's claims instead of the applicable two-year federal statute of limitations. The applicable federal statute of limitations is established in 47 U.S.C. § 415:

> All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

Instead of applying Section 415(a), the PUC applied the state law four-year statute of limitations in 66 Pa. C.S. § 1312. Dec. 5, 2012 Order at 82 (JA300); Aug. 15, 2013 Order at 39 (JA341). But a state statute of limitations cannot apply here because the traffic at issue is jurisdictionally interstate and thus the parties' dispute is governed exclusively by federal law. Indeed, the PUC itself found that "arguments of the Parties regarding the application of state law to this proceeding are no longer relevant to the disposition of Core's Complaint." Dec. 5, 2012 Order at 80 (JA298).

In its Aug. 15, 2013 Order, the PUC argued that, even if federal law applies, the four-year federal catch-all statute of limitations found at 28 U.S.C. § 1658 would apply, rather than the two-year statute of limitations at 47 U.S.C. § 415(a). Aug. 15, 2013 Order at 38 (JA340). But the "catch-all" applies only if Congress has not provided a specific limitations period for the claims at issue (28 U.S.C. § 1658), and here Congress provided a two-year limitations period in Section 415(a). To avoid this, the PUC cited *Castro v. Collecto, Inc.*, 634 F.3d 779, 786 (5th Cir. 2011), for the proposition that charges that are not subject to federal tariffing requirements are not subject to the limitations period in § 415(a). But the traffic here *is* subject to the federal tariffing requirement in 47 U.S.C. § 203, as

demonstrated above. Thus, even under *Castro*, it is clear that Section 415(a) supplies the applicable limitations period.

The PUC also found that, even if the two-year period in 47 U.S.C. § 415(a) applied, Core was entitled to all retroactive charges included on its first invoice to AT&T issued on January 1, 2008, because it filed its complaint with the PUC within two years of the date of that invoice. Aug. 15, 2013 Order at 38 (JA340). That is wrong. A claim accrues under Section 415(a) when a carrier discovers or, by exercise of due diligence could have discovered, the basis of the cause of action. *Commc'n Vend. Corp. of Arizona v. F.C.C.*, 365 F.3d 1064, 1073 (D.C. Cir. 2004). Core could have discovered the alleged basis for its purported claims when it terminated the traffic at issue. *See ALJ Initial Decision*, FoF ¶¶ 45-58 (JA197-198) (calls transmitted to Core contained signaling information identifying AT&T as the originating carrier). Core cannot profit off of its own lack of diligence. The limitations period began running when Core terminated each call at issue and expired two years thereafter. By applying a four-year limitations period, the PUC violated federal law. And, the effect of the PUC's error is substantial—almost all of the charges fall outside the two-year limitations period.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellees AT&T Corp. and TCA respectfully request that the district court's Judgment be affirmed.

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Respectfully submitted,

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CERTIFICATE OF ADMISSION TO BAR

1. I hereby certify pursuant to LAR 28.3(d) that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. Christopher S. Comstock also is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

/s/ Theodore A. Livingston
Theodore A. Livingston

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify the following:

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,631 words, according to the Word count, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

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Theodore A. Livingston

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/s/ Theodore A. Livingston
Theodore A. Livingston

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, I electronically filed the foregoing Brief of Appellees AT&T Corp. and Teleport Communications of America, LLC with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Theodore A. Livingston
Theodore A. Livingston